REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1922-1923.

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND ANOTHER . PLAINTIFFS;

AGAINST

THE MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . DEFENDANTS.

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MELBOURNE, *Mar.* 7, 8, 9.

BRISBANE, *June* 26.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Customs—Protection of the revenue—Wharves—Security by owner of wharves—Corporation established by State law having control of wharves—Bond—Conditions—Action on bond—Parties entitled to sue—Regulations, validity of—Customs Act 1901-1916 (*No.* 6 *of* 1901—*No.* 10 *of* 1916), *secs.* 4, 6, 30, 33, 42-44, 47-48, 270 *—*Customs Regulations* 1913 (*Statutory Rules* 1913, *No.* 346—1915, *No.* 70), *regs.* 3, 3A, *Form* 1A*—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 55, 64, 71—*Melbourne Harbour Trust Act* 1915 (*Vict.*) (*No.* 2697), *secs.* 60-62, 110.

* Sec. 42 of the *Customs Act* 1901-1916 provides that "The Customs shall have the right to require and take securities for compliance with this Act and generally for the protection of the revenue of the Customs," &c. Sec. 43 provides that "Where any security is required to be given such security may be by bond or guarantee or cash deposit or all or any of such methods so that in each case the security shall be approved by the Collector." Sec. 48 provides that "Whenever any such Customs security is put in suit by the Collector the production thereof without further proof shall entitle the Collector to judgment for their stated liability against the persons appearing to have executed the same unless the defendants shall prove compliance with the condition or that the security was not executed by them or release or satisfaction." Sec. 270 provides that "The Governor-General may make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the Customs," &c. Reg. 3A of the *Customs Regulations* 1913 provides that "Proprietors or lessees of sufferance wharves must furnish security for the protection of the revenue, in accordance with Form 1 or 1A, as the case requires." Forms 1 and 1A each prescribed a security in the form of a bond.

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In an action by the Commonwealth and the Acting Collector of Customs upon a bond in the form prescribed by the *Customs Regulations* 1913 (Form 1A), alleging that it was taken pursuant to sec. 42 of the *Customs Act* 1901-1916, and was a Customs security within sec. 48, and, alternatively, alleging breaches of the bond, the defendants by demurrer raised questions as to the nature of the security which the Customs had power to require.

Held, by the whole Court, that the demurrer should be overruled.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Starke* JJ., (1) that the bond as given was within sec. 42 and might be put in suit by the Commonwealth and the Collector of Customs as a Customs security; (2) that the bond covered goods which were subject to the control of the Customs whether dutiable or not dutiable; (3) that sec. 42 enables the Collector as the agent of the Executive to relinquish goods subject to his control in return for security in such one or more of the forms indicated in sec. 43 as he chooses, and that the Governor-General has authority under sec. 270 of the Act to prescribe that the security shall be taken in one form rather than another; and (4) that sec. 48 is a law relating to Customs and does not usurp the judicial power of the Commonwealth.

Marine Board of Hobart v. *The Commonwealth*, (1915) 20 C.L.R., 15, followed.

Per Isaacs and *Higgins* JJ.: An action might be brought by the Commonwealth upon the bond as a contract and apart from the *Customs Act*.

Per Higgins J.:—The bond is a lawful contract; it is no defence to an action on the contract to say that the defendant ought not to have been required by the Customs to make it; and a demurrer to such an action is not a proper means of raising the question as to the nature of the bond which the Customs has power to require. On the proper construction of this bond the obligee is the Commonwealth.

DEMURRERS.

An action was brought in the High Court by the Commonwealth and Charles Henry Green, Acting Collector of Customs for the State of Victoria, against the Melbourne Harbour Trust Commissioners in which the pleadings were as follows:—

By the statement of claim the plaintiffs said:—

1. On or about 2nd August 1916 the defendants duly executed under seal an instrument whereof the following is a copy:—"By this security the subscribers are, pursuant to the *Customs Act* 1901-1916, bound to the Customs of the Commonwealth of Australia in the sum of five thousand pounds subject only to these conditions, that if all goods which without payment of duty are discharged at the sufferance wharves at the Port of Melbourne shall, while such goods shall be and remain upon such wharf or in any shed or store

attached to such wharf, or upon any lands or premises adjacent to such wharf and used for the temporary storage of goods discharged at such wharf, be safely and securely kept upon the said wharf or in the said shed or store, or upon the said lands or premises, and there be preserved in good state and condition by the said Melbourne Harbour Trust Commissioners or their agents, free from all loss, deficiency, or damage, save such as may arise from unavoidable accident, and if before removal thereof from the said wharf, shed, store, land, or premises all such goods shall be duly entered for home consumption, and all duty due thereon shall be paid, or shall be duly entered for warehousing or for transhipment, and also if all such goods shall be dealt with in accordance, in all things, with the provisions of the said Act and of the Regulations in force thereunder and to the satisfaction of the Collector of Customs for the State of Victoria, then this security shall be thereby discharged."

2. The said instrument was furnished as a security pursuant to regs. 3 or 3A of the *Customs Regulations*.

3. By reason of the fact alleged in par. 2 hereof the said instrument was (*a*) taken pursuant to sec. 42 of the *Customs Act* 1901-1916; (*b*) a Customs security within the meaning of sec. 48 of such Act which is now put in suit by the Collector.

4. Alternatively, (*a*) goods, which without payment of duty were discharged at sufferance wharves at the Port of Melbourne, were not, whilst such goods were and remained upon such wharf or in a shed or store attached to such wharf or upon lands or premises adjacent to such wharf and used for the temporary storage of goods discharged at such wharf, safely and securely kept upon the said wharf and in the said shed or store and upon the said lands or premises and were not there preserved in good state and condition by the defendants and their agents free from all loss, deficiency or damage save such as may arise from unavoidable accident; (*b*) all such goods, before removal thereof from the said wharf, shed, store, land and premises, were not duly entered for home consumption and all duty thereon was not paid or duly entered for warehousing or for transhipment; (*c*) all such goods were not dealt with in accordance in all things with the provisions of the said Act and of the

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Regulations in force thereunder and to the satisfaction of the Collector of Customs for the State of Victoria.

[Particulars were then given of certain goods which, having been placed on a wharf on 8th July 1919, 29th December 1919 and 28th January 1920 respectively, had been unlawfully and without authority removed, had disappeared and were lost.]

The plaintiff claimed £5,000.

The defendants demurred as follows :—

The defendants say that the statement of claim is bad in substance and shows no cause of action.

Matters of law intended to be argued are :—

1. The instrument set out in the statement of claim is upon its true construction not a security for compliance with the *Customs Act* or for the protection of the revenue of the Customs.

2. The said instrument is not a Customs security within the meaning of sec. 48 of the *Customs Act* 1901.

3. The said instrument is not a security in relation to any particular goods subject to the control of the Customs.

4. It is not alleged in the statement of claim that any duties or obligations in relation to the goods referred to in the said instrument or in relation to the goods mentioned in par. 4 of the statement of claim were or are imposed upon the defendants by the *Customs Act*.

5. The *Customs Regulations* referred to in the statement of claim are invalid.

6. The above objections apply to the whole of the statement of claim.

The defendants further say as to the plaintiffs' claim contained in pars. 1, 2 and 3 of the statement of claim that it is bad in substance and shows no cause of action.

A matter of law intended to be argued is :—

7. This action is subject to the provisions of the *Instruments Act* 1915 (Vict.), sec. 123. The plaintiffs have not in par. 1, 2 and 3 of the statement of claim assigned any breaches of the condition of the bond set out in the statement of claim.

8. The objection set forth in par. 7 applies to pars. 1, 2 and 3 of the statement of claim.

The defendants by their defence said :—

1. They admit pars. 1 and 2 of the statement of claim.

2. They deny each and every allegation contained in par. 3 of the statement of claim.

3. Save that they deny that the wharves at which the said goods were landed were sufferance wharves they admit par. 4 of the statement of claim.

4. No duties or obligations in relation to the said goods or any of them were or are imposed upon the defendants by the *Customs Acts* and the defendants were not and are not subject to any obligation to the plaintiffs in relation thereto, and in particular the defendants (apart from what may be held to be the effect of the said instrument) were and are under no duty or obligation in relation to any of the said goods to do or perform any of the things or matters specified in the condition set forth in the said instrument.

5. The defendants were not entitled as against any person to receive delivery of any of the said goods.

6. On 2nd December 1919 the defendants duly executed under seal a notice of which the following is a copy :—"To the Customs, Commonwealth of Australia.—Whereas by a certain security dated 2nd August 1916 given by the Melbourne Harbour Trust Commissioners to you under the provisions of the *Customs Act* 1901-1916 securing the payment of the sum of £5,000 subject only to the conditions in the said security set out the said the Melbourne Harbour Trust Commissioners hereby give you notice that as from the date of the service hereof the said the Melbourne Harbour Trust Commissioners hereby withdraw the said security and absolutely cancel and make void the same without prejudice however to any rights which may have arisen prior to the time of such service or which shall thereafter arise in respect of goods which prior to such service have been discharged at the sufferance wharves referred to in the said security."

7. On 4th December 1919 the said notice was served on the plaintiff the Acting Collector of Customs and the obligation (if any) of the said instrument was thereby determined.

The plaintiffs demurred to the defence as follows :—

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The plaintiffs say that pars. 4, 5, 6 and 7 of the defence are bad in substance and show no matter of defence.

Matters of law intended to be argued :—

1. That the allegations contained in par. 4 are erroneous in law.

2. That the allegations contained in par. 4 are immaterial.

3. That the allegations contained in par. 5 are erroneous in law and immaterial.

4. That the allegations contained in pars. 6 and 7 are immaterial and the statement that the obligation of the said instrument was thereby determined is erroneous in law.

The plaintiffs joined issue upon the defence.

The demurrers now came on for argument before the Full Court.

Latham K.C. and *Gregory*, for the defendants. This bond is not a Customs security within the meaning of sec. 48 of the *Customs Act* 1901-1916. Sec. 42 authorizes the Customs to require a bond to be given to secure "compliance with this Act," that is, where the Act imposes some duty in relation to goods upon the person required to give it. No duty is imposed on the defendants to protect goods landed at wharves under their control, and therefore no security can be required from them to compel them to protect such goods. Secs. 42 to 48 contemplate the case of merchants importing goods, and not that of a public body which has some relation to such goods. Those sections are complete in themselves, and do not contemplate any regulations. The bond goes beyond the "protection of the revenue of the Customs," because it applies to goods upon which duty has been paid and which are out of the control of the Customs. The condition requiring the satisfaction of the Collector of Customs is not a security either for compliance with the Act or for the protection of the revenue of the Customs. The conditions of the bond are cumulative, so that the bond is not satisfied by the payment of duty alone. Sec. 42 is aimed at particular transactions in respect of particular goods and security in respect of such transactions and such goods. Sec. 44 is introduced for the purpose of extending the security beyond the case of particular goods, so as to cover all transactions in relation to which a legal relation arises between the

Customs and a particular individual. The placing of goods on a wharf is not a transaction between the Customs and the wharf-owner. The appointment of a sufferance wharf under sec. 17 is not such a transaction. Sec. 270 does not authorize the making of regulations which are not for compliance with the Act or for the protection of the revenue. The bond, if valid, would entitle the Customs to recover from the defendants in respect of the loss of goods lost through the negligence of an officer of the Customs for which under sec. 34 the Customs are liable. Regs. 3 and 3A of the *Customs Regulations* 1913 are *ultra vires*. Sec. 43 gives an option to a person required to give a security to give it in any one or more of three ways. Regs. 3 and 3A are inconsistent with sec. 43, for they take away that option and provide that the only security which can be given shall be a bond. If sec. 43 does not give such an option it gives a discretion to the Collector, which cannot be taken away by regulations. The case of *Marine Board of Hobart* v. *The Commonwealth* (1) was decided on the basis that the Marine Board was in the same position as any member of the public; but the defendants are not in that position (see *Melbourne Harbour Trust Act* 1915, secs. 46, 47, 48). The definition in sec. 4 of the *Customs Act* of "the Customs" as the Department of Trade and Customs does not make the Customs a legal entity. Pars. 1, 2 and 4 of the statement of claim make a claim based on contract. In that view the present plaintiffs are not parties to the bond and cannot sue upon it. Sec. 48 is invalid as being an exercise of the judicial power of the Commonwealth by the Legislature, and also because it is a law in respect of contracts and not in respect of Customs. The effect of the section is that the putting in suit of the bond is proof of a breach of it, but the question of whether there has been a breach is for the Court to decide. The contract evidenced by a bond of this kind is that the obligee will pay the damages occasioned by the breach (see 8 & 9 Will. III. c. 11, sec. 8), and sec. 48 says that judgment is to be given for the amount of the bond.

Owen Dixon K.C. (with him *C. Gavan Duffy*), for the plaintiffs. The bond which has been given is a Customs security within sec. 48.

(1) (1915) 20 C.L.R., 15.

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Sec. 42 does not limit the cases in which the Customs may require a bond. Sec. 270 authorizes the making of regulations which are convenient to be prescribed for giving effect to the Act or for the conduct of the business of the Customs, and it cannot be said that the requiring a bond to be given in this form is not convenient for either of those purposes. The condition requiring the satisfaction of the Collector does not go beyond the power. Someone must be satisfied that the conditions have been complied with, and the Collector may be named as the person to be satisfied. The satisfaction must be reasonable. If that condition is bad it is severable and may be ignored, and the rest of the bond stands. Sec. 43 does not confer an election upon the subject, but it confers a power upon the Customs with a choice in the Customs which form of security shall be required. The Governor in Council may then direct that one of the forms only shall be adopted. Pars. 1 and 2 of the statement of claim disclose a cause of action at common law. The statute 8 & 9 Will. III. c. 11 does not apply to the Crown (*R.* v. *Peto* (1)), and therefore it is sufficient at common law to sue for the penalty of the bond without assigning breaches. The term "the Customs" in the *Customs Act* means His Majesty through His Department of Trade and Customs, and therefore the Commonwealth can sue upon the bond. It is sufficient if the obligee of a bond is indicated in such a way that he can be identified (*Langdon* v. *Goole* (2) ; *Lambert* v. *Branthwaite* (3)). The Collector can sue upon the bond by virtue of sec. 48.

Latham K.C., in reply. The condition requiring the satisfaction of the Collector is not severable, for under reg. 195 the form of the bond cannot be departed from. The bond was intended to have the effect of a Customs security ; and if it has not that effect it has no effect at all.

Cur. adv. vult.

June 26.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The plaintiffs by their statement of claim in this action declared upon a bond, executed

(1) (1826) 1 Y. & J., 169. (2) (1681) 3 Lev., 21.
(3) (1733) 2 Str., 945.

by the defendants, in the following form :—[The bond was here set out, and the judgment continued :—] The defendant demurred generally to the statement of claim.

The demurrer must be overruled. It might, perhaps, be sufficient to rest our opinion upon the decision of this Court in *Marine Board of Hobart* v. *The Commonwealth* (1), but, as the argument before us in the present case covered some new ground, we think it desirable to deal with it.

By sec. 42 of the *Customs Act* it is provided that the Customs shall have the right to require and take securities for compliance with the Act, and generally for the protection of the revenue of the Customs. And by the *Customs Regulations* 1913-1914, purporting to have been made pursuant to the *Customs Act*, it is provided that proprietors or lessees of certain wharves shall give security in accordance with the appropriate form in the Schedule. The bond in the present case followed the skeleton form set forth in Schedule I. to the *Customs Act* (see also sec. 47), and also the particular form set forth in the *Customs Regulations*.

The argument for the defendants, however, denied that the bond was a Customs security, or enforceable as such, on the following grounds :—(1) The bond exceeded the requirements of sec. 42 of the Act. It covered goods that were not dutiable. It could only be discharged on conditions that were not provisions for compliance with the Act or for the protection of the revenue of the Customs. The condition that the bond should not be discharged unless the goods mentioned therein were dealt with in all things in accordance with the Act and the Regulations and to the satisfaction of the Collector of Customs for the State of Victoria was cited as a particular instance of this vice. (2) The *Customs Regulations* relating to bonds were *ultra vires*. They required a bond which exceeded the provisions of sec. 42 of the Act, and deprived owners and consignees of a right that was said to exist under sec. 43, of depositing cash, or took away from the Collector of Customs a discretion that was conferred upon him under the section. (3) The provisions of sec. 48 of the Act were an attempt to exercise the judicial power of the Commonwealth, and therefore invalid.

(1) (1915) 20 C.L.R., 15.

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It is unnecessary for us to consider the validity of the assumption involved in these objections, namely, that a bond to the Customs can only be supported if given in accordance with the provisions of sec. 42 of the Act; for we are of opinion that the bond can be supported under that section.

As a matter of construction we agree that the bond and the Regulations cover goods which are subject to the control of the Customs, whether dutiable or not dutiable. And, despite an incautious statement in the *Marine Board's Case* (1) to the effect that the Regulations only apply to dutiable goods, the Act brings under the control of the Customs all goods which are imported. (See secs. 30, 35-39.) Examination of the goods may be necessary to determine whether they are or are not dutiable and whether they are or are not prohibited imports (see secs. 49, 50, 52), and for other purposes. Sec. 42, then, must, as a matter of necessity, cover all goods subject to the control of the Customs, and indeed the later words of the section, providing that the Customs, "pending the giving of the required security in relation to any goods subject to" its control, may refuse to deliver the goods or to pass any entry relating thereto, make the legislative intent quite clear.

Let us examine the various conditions of the bond. The first provides for the safe keeping of goods discharged on the wharf whilst subject to Customs control, and the second for their proper entry and payment of duty, &c., before removal. We cannot see any better way of securing compliance with the Act and protecting the revenue, once the goods are out of the custody of the Customs, than by attaching liability to the person or body permitted to have possession of them in the event of the goods being lost or damaged or in the event of a failure to enter or pay duty (if any) upon the goods. These conditions are therefore, in our opinion, clearly within sec. 42. We next come to the condition that all such goods shall be dealt with in accordance in all things with the Act and Regulations and to the satisfaction of the Collector. So far as this condition stipulates for compliance with the Act and Regulations (see "This Act," sec. 4) the provisions of sec. 42 are not exceeded, unless the Regulations be *ultra vires*—a point more properly dealt

(1) (1915) 20 C.L.R., at p. 19.

with at a later stage. But so far as it stipulates for the satisfaction of the Collector the matter requires some consideration.

It is possible that the Collector might not, owing to some mistake, be satisfied that the Act and Regulations had been complied with when in fact and in law all had been duly followed. The possibility must be admitted, but we know that in ordinary business matters the due performance of an obligation often requires this performance to be certified to the satisfaction of some engineer, architect or other person.

Is it, then, beyond the ambit of sec. 42 that the Customs should require, not only a security for compliance with the Act, but a security conditioned upon that compliance, and all dealings not regulated by the Act, being to the satisfaction of its own officers? Such a provision may not be, we think, unreasonable or improper with respect to the goods the subject matter of the bond for the purpose of protecting the revenue. It may be that for that purpose it is desirable that the Collector of Customs should have as complete a dominion over them as if he continued to have their custody, or that their preservation and safety should be secured even more completely than if he had done so.

The security which is substituted for the possession of the goods by the Customs must be as effective for administrative and other purposes as the control of the goods would have been; otherwise the security is ineffective. Possession of goods by the Customs gives it a very real method of compelling compliance with the Act. And if the Customs gives up that possession many practical and legal difficulties might easily arise in proving non-compliance with the Act and in protecting the revenue. Consequently, the Customs requires that a party obtaining possession of the goods should satisfy it or one of its officers in the way specified in the bond. Indeed, it may be said that such a provision is almost necessary if the security is to be really effective. This conclusion also supports the Regulations.

One other argument on the form of the bond given in this case and prescribed by the Regulations must be noticed. It was said that the bond and the Regulations contravene the provisions of sec. 43 of the Act. Either the right of the party or that of the Customs

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to require security in the form of a guarantee or cash deposit is taken away and a bond in the form prescribed by the Regulations is the only form of security allowed. The objection cannot be sustained in the case of a party who, as in the case of the Melbourne Harbour Trust Commissioners, has given a bond. But in any case the provisions of sec. 42 merely enable the Collector as the agent of the Executive to relinquish goods subject to his control, in return for security in such one or more of the forms indicated by the statute as he chooses. And it is within the competence of the Governor-General under sec. 270 to prescribe by regulation that the security should take one form rather than another.

An argument was also made that sec. 48 of the Act is not a law relating to Customs, and is also a usurpation of the judicial power of the Commonwealth. Neither of these contentions can be sustained. The section makes provision for the enforcement of a Customs security, and in effect casts upon the party who purports to have given the security the burden of proving either that he has not executed it or that he has complied with its conditions or that the security has been released or satisfied. A law does not usurp judicial power because it regulates the method or burden of proving facts. And the mere statement of the purpose and operation of sec. 48 establishes it as a law relating to Customs.

The plaintiffs also contended that their claim was not demurrable even if the bond could not be supported by reference to the provisions of the *Customs Act*. In view of our opinion on the Act and the Regulations, we think it undesirable to make any pronouncement on this point.

The defendants pleaded as well as demurred to the statement of claim of the plaintiffs. And the plaintiffs demurred to pars. 4, 5, 6 and 7 of the defence. This latter demurrer must be allowed. It was admitted that the matters pleaded in pars. 6 and 7 of the defence could not be supported. And the matters raised by pars. 4 and 5 of the defence involve the same questions of law, already decided in favour of the plaintiffs on the defendant's demurrer; so that no further discussion of them is required.

ISAACS J. This is an action on a bond dated 2nd August 1916

given by defendants to "the Customs of the Commonwealth of Australia" for £5,000 on conditions therein set out. The conditions are in substance that (1) if all goods which, without payment of duty, are discharged at the sufferance wharves at the Port of Melbourne shall, *while on such wharf*, be safely and securely kept on the wharf, &c., and there preserved in good condition by the Melbourne Harbour Trust Commissioners or their agents, free from loss, deficiency or damage—except from unavoidable accidents, and (2) *if before removal* the goods (*a*) be duly entered for home consumption and duty paid, or (*b*) be duly entered for warehousing and transhipment, and also (3) if all such goods shall be *dealt with* in accordance in all things with the provisions of the Customs Acts and Regulations, and to the satisfaction of the Collector of Customs for the State of Victoria; "then this security to be discharged."

The statement of claim alleges, in par. 2, that the instrument was furnished as a security pursuant to reg. 3 or 3A of the *Customs Regulations*. Then, by par. 3, one of two alternative legal views of the effect of the bond is presented. It is claimed that it was taken pursuant to sec. 42 of the Act, and that it is a "Customs security" within the meaning of sec. 48. By par. 4 the other alternative view is put forward, that, if it be not within sec. 48, the plaintiffs fulfil by allegations of fact the requirements of pleading in an action on the bond—considered as not within sec. 48 but either as given by virtue of regs. 3 or 3A, or as valid at common law.

The defence in effect demurs to the whole statement of claim, and the arguments maintain all the contentions therein appearing except that in par. 6—cancellation. The defendants' contention may be thus conveniently stated:—(1) The bond is invalid because, the defendants having no duty towards the Customs, there was no power under sec. 42 to require and take the bond. (2) Reg. 3A (the one really relevant) is invalid because it limits the possible security to a bond whereas sec. 43 of the Act gives the obligor a choice of bond, guarantee and cash deposit, leaving only details, though possibly important details, to be approved by the Collector; the bond therefore cannot be sustained as a Customs security under sec. 43, and if not, then it is outside sec. 48. (3) As it purports to be under reg. 3A and is not so in law, it entirely fails.

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(4) Regarded otherwise than as a "Customs security" under sec. 48, it has no validity under any Customs enactment, and at common law there is no proper obligee. (5) Sec. 48 is in any case invalid as an attempt to exercise judicial power. (6) The condition goes beyond anything reasonable because it requires that the goods shall be dealt with not only in accordance with the Act and Regulations but also to the satisfaction of the Collector. I deal with these objections as under.

(1) The Melbourne Harbour Trust Commissioners are a body constituted by the law of Victoria, under the Act No. 2697 of 1915, to manage the Port of Melbourne, and the bed and soil and shores of the waters and parcels of land within the statutory metes and bounds. The exclusive management and control of the Port is vested in the Commissioners. Among their property are "wharves" (secs. 60 and 61) and sheds for the reception of goods (sec. 62). By secs. 110, &c., tolls and rates may be charged for receiving goods on wharves. This is equivalent to a business (see *Port of London Authority* v. *Inland Revenue Commissioners* (1)).

Under the Commonwealth *Customs Tariff Act*, duties of Customs are imposed; and by the *Customs Acts* ancillary provisions are made separately, pursuant to constitutional requirement. By sec. 30 it is enacted (*inter alia*) that goods imported shall be subject to the control of the Customs from the time of importation until delivery for home consumption, or until exportation to parts beyond the seas, whichever shall first happen. By sec. 33 it is enacted that "no goods subject to the control of the Customs shall be moved altered or interfered with except *by authority and in accordance with this Act.*" The double provision will be noted, showing that the phrase "in accordance with this Act" does not necessarily cover directions of the Collector.

Before imported goods are allowed to pass into the general stock of the community, entries have to be made, the goods examined, and, if found to be importable, may be imported and duties, if any, leviable must be paid. But, for the convenience of importers, goods are allowed to be deposited on the defendants' wharves and deposited in stores and sheds, pending the final determination of the owners as to their complete importation.

(1) (1920) 2 K.B., 612.

The defendants, for the benefit of their own undertaking, and having custody and control of the goods—of course, in large quantities, the duties on which probably reach several thousands of pounds—are required to give some security to the Government for the protection of the revenue in respect of the goods they undertake to receive on their wharves and in their stores and sheds. As soon as they assume the receipt and storage of uncustomed goods, they are in a position of responsibility. The Commonwealth is not bound to permit those goods, which are by law "under the control of the Customs," to remain there unless duty is forthwith paid. But, as the Harbour Trust, for its own business, desires to retain custody of the goods without paying duty, sufferance wharves are allowed, and the owner of such a wharf is required to give a bond to the Customs. The point taken is, therefore, unsustainable.

(2) Reg. 3A is said to be invalid because "inconsistent" with the Act (particularly sec. 43), and therefore beyond the power of the Governor-General, under sec. 270, to make. The inconsistency suggested is, as I have said, that sec. 43 gives the obligor the choice of form of security and reg. 3A does not. The objection cannot, in my opinion, be sustained. Primarily, dues must be paid, and paid in cash and *instanter*. Parliament permits a deviation from that course, but only on certain conditions. The security cannot be validly taken in any form but those prescribed by Parliament, namely, "bond," "guarantee" or "cash deposit." But the approval as to which of these shall in any given case be taken is vested in the "Collector." He may require not merely one form but "all" or "any" of these forms. If he permits any other it is illegal, but he is the person as between him and the importer to choose which of the three shall be adopted. He may refuse to approve of any but a bond, and he may refuse the form or amount of it, or he may decline the offered guarantee and be dissatisfied with the solvency of the proposed surety. He may think a cash deposit proper or burdensome. The "Collector," it must be remembered by the definition section, 4, includes the Comptroller and any State Collector, and in fact any Customs officer doing duty in the matter. This may take place at any point of import throughout the vast coast-line of Australia. The officer may find it inconvenient to

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accept the money, or he may decline to take a guarantee; and so on. There is no reason for giving the choice to the importer, because strictly he should pay cash and the whole question of security is a relaxation in his favour. He must, therefore, do what is required by the Customs. It would be absurd that he should have the choice of any one of the three forms, and yet that "all" should either be required to be given or need approval. It need not be said that the Collector "in such a case is merely acting under the direction of the Crown and can be controlled *in this respect* by a direction of the Governor-General in Council." I am therefore of opinion that reg. 3A, which is expressly made "for the protection of the revenue," is valid. The bond is consequently, in the view so expressed, a security both under sec. 43 and sec. 48.

(3) The point is that, the bond having been rested on reg. 3A, it must fail if that regulation is bad, even though, if otherwise pleaded, it could stand for other reasons that were good. That cannot be accepted. Well-known principles prevent it (see *Nocton* v. *Ashburton* (1)).

(4) The fourth question arises only if the second point succeeds; but, as it was argued, I give my opinion. Apart from the strict provisions of secs. 43 and 48 the fact remains that the Customs could, and would, if the laws were observed, have refused to allow the goods to remain in the defendants' custody unless the bond has been given. And so the bond was in fact given. It has all the form of a common-law bond, and what is to prevent it having efficacy as such if it fails to operate under sec. 48? It is first said that the Commonwealth of Australia cannot sue because the bond is made in favour of "The Customs of the Commonwealth of Australia." But it purports to be under the *Customs Act* 1901-1916, and we have to see, as a matter of interpretation by reference to that Act, what is meant by the term "The Customs of the Commonwealth of Australia." By sec. 4 "The Customs" means the "Department of Trade and Customs." On 1st January 1901 the Governor-General directed it to be notified, and it was notified, that His Excellency with the advice of the Federal Executive

(1) (1914) A.C., 932, at pp. 965, 968, 977.

Council had established certain Departments of State of the Commonwealth—and among these was "the Department of Trade and Customs." That was in pursuance of the power contained in sec. 64 of the Constitution, which also provides that the officer appointed by the Governor-General to administer those Departments shall be the Sovereign's Minister of State for the Commonwealth. Sec. 6 of the *Customs Act* declares that until otherwise lawfully determined (and it has not been otherwise determined) the Customs Acts shall be administered by the Minister of State for the Commonwealth, administering "the Customs," that is the Department. It is, therefore, incontestable that the name of the obligee "The Customs of the Commonwealth of Australia" is in law the Commonwealth for the purpose of the Customs. There are some very cogent authorities, including *Maugham* v. *Sharpe* (1), *Reeves* v. *Watts* (2) and others. But I shall quote from one only, *Simmons* v. *Woodward* (3). There Lord *Halsbury* says of *Maugham* v. *Sharpe* that it "is a very apt and cogent illustration of a very familiar principle of law, that where you are dealing with a grantee, you may describe that grantee in any way which is capable of ascertainment afterwards: you are not bound to give him a particular name; you are not bound to give his christian name or his surname; you may describe him by any description by which the parties to the instrument think it right to describe him." Now, when we know as a matter of law that the Commonwealth of Australia transacts its business relating to the Customs, under the name of "the Customs" and by means of its Department of Trade and Customs, the objection as to identity is plainly unsustainable, even if we regard the deed as one at common law.

(5) Sec. 48 was attacked as invalid because, it is said, it is an attempt by the Legislature to exercise judicial power and that, it is said, is vested exclusively in the Judicature. There is no substance in the objection. It is a mere evidentiary section and of a class well known in Customs Acts. For instance, in England, in the Act 39 & 40 Vict. c. 36, secs. 259, 260, 262. These are only examples of many enactments placing the burden of proof on

(1) (1864) 17 C.B. (N.S.), 443. (2) (1866) L.R. 1 Q.B., 412.
(3) (1892) A.C., 100, at p. 105.

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defendants, whose knowledge of the true facts is necessarily greater than that of anyone else. Justice might easily be otherwise defeated. For instance, under the American Constitution, see per *Marshall* C.J. in the case of *The Schooner Thomas and Henry* v. *United States* (1), and by *Gray* C.J. in *Holmes* v. *Hunt* (2).

(6) The reference to the satisfaction of the Collector is not arbitrary or even really additional; as already mentioned, it is assumed by the Act that goods might be removed, &c., "in accordance with this Act" ("Act" includes "regulations," sec. 4), and yet not "by authority." "By authority" means (sec. 4) by the authority of the officer of Customs doing duty in the matter in relation to which the expression is used. By the terms of the bond that officer is "the Collector," and that has practically the same meaning. There are many parts of the Act expressly requiring the satisfaction of the Collector, and these are elastic, as distinguished from precise provisions of the Act itself or the Regulations. But in any case it is a well-known principle that if such a term in the conditions were unauthorized it could be ignored, unless it were relied on as the ground of the breach.

In my opinion, the defendants' objections should be all overruled.

HIGGINS J. In my opinion, the demurrer of the defendants should be overruled.

The action is brought on a bond given by the Harbour Trust as to goods discharged without payment of duty at the sufferance wharves of the Port of Melbourne; and the demurrer raises the point that in several respects the bond contains conditions such as under the *Customs Act* the Customs authorities had no right to require of wharfingers. But even if the conditions could not lawfully have been imposed, that fact is no answer to the bond. The bond is not the exercise of a power, but a contract. There is nothing illegal or impossible in the contract itself; there is no law forbidding a wharfinger to consent to other conditions than those which are made imperative by the Act. The demurring party has to show that the statement of claim discloses no cause of action; but here

(1) (1818) 23 Fed. Cas., 988, at p. 990; 1 Brock., 367.
(2) (1877) 122 Mass., 505, at p. 519.

there is a good cause of action in the promise under seal to pay £5,000 subject to the condition that if certain things are done the security is discharged. The contract remains and is binding until it be rescinded on some definite ground of fraud, mistake, &c. It is no defence to a contract to say that the defendant ought not to have been required (if he was in fact required) to make the contract. If the defendant ought not to have been required to make such a contract, the law provides other appropriate remedies. In the case of *Marine Board of Hobart* v. *The Commonwealth* (1) this Court entertained an action for a declaration that the Commonwealth is not entitled to require a bond with certain conditions, and for an injunction restraining the Commonwealth from taking any steps to compel the Marine Board to give such a bond; but, whatever be the appropriate remedy under the circumstances, the defendant cannot say that there is no cause of action on a contract not illegal in itself which was made and is not set aside.

The words of the bond follow, in the main, the form prescribed by the *Customs Regulations* 1913. They profess to be, and no doubt were meant to be, "pursuant to the *Customs Act* 1901-1916." In accordance with the form prescribed, they say that the Harbour Trust is "bound to the Customs of the Commonwealth of Australia." It is urged that the Customs is not a legal entity, is neither a person nor a corporation; and this is true. But it does not follow that the bond does not disclose any obligee. On a fair construction of the words, the obligee is the Commonwealth, in relation to the Customs Department, as distinguished from the Defence Department, the Department of Home and Territories, &c. A bond executed with a blank for the name of the obligee would ordinarily be void; but the Courts struggle to find, from a consideration of the whole document, who was meant to be the obligee —*ut res magis valeat quam pereat.* As said in *Cruise's Digest*, title XXXII., Deed, ch. XXI., "Mistakes in the description of the parties will not, unless very gross, make a deed void": *Nil facit error nominis cum de corpore constat.* Here, the Commonwealth, a legal entity, is the obligee; and it sues the defendant on the bond.

My view is that a demurrer to an action on the bond is not a

(1) (1915) 20 C.L.R., 15.

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proper means for raising the question as to the nature of the bond which the Customs has power to require.

I concur in the order proposed by the Chief Justice. *Gavan Duffy* and *Starke* JJ.

Demurrer to statement of claim overruled. Demurrer to pars. 4, 5, 6 and 7 of the defence allowed.

Solicitor for the plaintiffs, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the defendants, *Malleson, Stewart, Stawell & Nankivell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MENARD AND ANOTHER . . . . . APPELLANTS; PETITIONERS,

AND

HORWOOD AND COMPANY LIMITED . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 11, 12.

Knox C.J., Gavan Duffy and Starke JJ.

Company—Compulsory winding up—"Just and equitable"—Fraud of director—Restrictions on alienation of shares—Companies Act 1899 (*N.S.W.*) (*No.* 40 *of* 1899), *sec.* 84 (*e*).

The governing director of a company, who with his wife held the majority of the shares in the company, had, in respect of a contract by the company to buy goods on commission for a principal, fraudulently charged, on behalf of the company, a higher price than had in fact been paid and commission on